IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	§	
	§	
v.	§	ID 0903021873
	§	SBI: 00
MATTHEW PHLIPOT,	§	

O R D E R

Upon Defendant's Motion to Dismiss the Indictment.
Denied.

NOW, THIS 6th day of JANUARY, 2010,

Introduction. Defendant Matthew Phlipot was charged with four counts of rape fourth degree as well as numerous related charges. Phlipot moves to dismiss the indictment on grounds of violation of his right to equal protection of law under the Fourteenth Amendment of the United States Constitution.[1] He argues that the fourth degree rape statute creates two classes of individuals that are treated differently and do not rationally serve any governmental interest. The charges against Phlipot stem from alleged

[1]Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

sexual relations between himself and Kelsey Kennard, who was 17 years old at the relevant times, in violation of 11 *Del. C.* § 770(a)(2). This statute provides as follows:

> A person is guilty of rape in the fourth degree when the person: . . .
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> (2) Intentionally engages in sexual intercourse with another person, and the victim has not yet reached that victim's eighteenth birthday, and the person is 30 years of age or older, except that such intercourse shall not be unlawful if the victim and person are married at the time of such intercourse. . . .

Equal protection law. Under traditional equal protection analysis, a legislative classification is presumed to be constitutional and must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest.[2] Inherently suspect classifications, which are those based on race, alienage and national origin, are subject to strict scrutiny and a heavy burden of justification.[3] Placement in this category bars the application of the presumption of constitutionality and requires the showing of a compelling state interest to justify the law. Classifications based on gender are subject to a "middle tier" approach.[4] The classifications identified by Defendant in this case do not fall into either of these categories and are therefore subject to a rational basis analysis; that is, the classifications are accorded a strong presumption of constitutionality and will be sustained if they meet a rational relationship with a legitimate governmental

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[2] *Frontiero v. Robinson,* 411 U.S. 677 (1973).

[3] *Loving v. Virginia*, 388 U.S. 1 (1967).

[4] *State v. Brothers*, 384 A.2d 402 (Del. Super. Ct. 1978).

purpose.[5]

Contentions. Defendant asserts that § 770(a)(2) creates two classes of individuals who are subject to disparate treatment: first, persons over the age of 30 who have sexual intercourse with persons less than 18 years old and, second, persons over the age of 30 who have sexual intercourse with persons under the age of 18 to whom they are married. He argues that the General Assembly could not have rationally intended to protect persons under the age of 18 from the sexual advances of persons over the age of 30 while legalizing such conduct for married persons of the same ages. The two issues raised by this argument are whether there is a rational basis for treating married people differently from unmarried people and whether there is a rational basis for the age classifications created under the statute.

Discussion. Marriage is a social relation that is subject to the State's police power, although the State's power to regulate it is not unlimited.[6] In Delaware, an individual under the age of 18 cannot marry without a court order granting a petition filed by the minor's parent, guardian or next friend.[7] If the legal requirements are met and the marriage is finalized, it follows that the adult spouse of the minor spouse cannot be charged with a crime for having "sexual intercourse" with the minor, even if one spouse is

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[5]*Gray v. Commonwealth*. 645 S.E.2d 448 (Va. 2007).

[6]*Loving v. Virginia,* 388 U.S. 1, 7 (1967) (holding that statutes preventing marriages solely on the basis of racial classifications violated equal protection and due process).

[7]Title 13 *Del. C.* § 123.

over the age of 30 and the other spouse is under the age of 18. Section 770(a)(2) is consistent with § 123 by protecting the same class of persons, those who are less than 18 years of age, from sexual intercourse with adults over the age of 30. Section 770(a)(2) creates an exception for married persons in these same age brackets. Both 13 *Del. C.* § 123 and 11 *Del. C.* § 770(a)(2) manifest a legislative intent to protect individuals less than 18 years of age from possible sexual predators or unwanted sexual advances. These statutes unambiguously reflect legislative efforts to minimize if not eliminate such potentially predatory behavior. The Court concludes that there is a rational basis for treating married people in these classifications differently from unmarried persons and that § 770(a)(2) is a valid means of protecting unmarried victims under the age of 18 from undesirable sexual intercourse.

The next question is whether the statute violates equal protection based on the age classifications regardless of the married state of the two persons. Florida has a statute that is similar to § 770 (a)(2) but without an exception for married people. The Florida statute makes it a second degree felony for a person 24 years of age or older to engage in "sexual activity" with a person 16 or 17 years old.[8] In *Wright v. State*, the defendant argued that

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[8]Section 794.05, Florida Statutes (1997) provides in pertinent part:
(1) A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree. . . . As used in this section, "sexual activity" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; however, sexual activity does not include an act done for a bona fide medical purpose.

the Florida statute violated equal protection and his fundamental right to privacy.[9] The court noted first that when a defendant asserts the violation of a fundamental right, the state must demonstrate a compelling state interest in order to validate the intrusion. In rejecting the defendant's fundamental right argument, the *Wright* court found that the statute furthered the compelling state interest in protecting minors from harmful sexual conduct and possible sexual exploitation by adults and that the statute was the least intrusive means of accomplishing that goal.[10] In the case at bar, Defendant does not argue that § 770(a)(2) violates the fundamental right to privacy, but confines his argument to a violation of equal protection.

The *Wright* court noted that age limitations and restrictions may survive an equal protection challenge and be enforced if they pass the "rational basis" test, that is, the age classifications must be reasonably related to a permissible governmental objective.[11] A similar result is found in *Commonwealth v. Albert*,[12] where the defendant challenged a statute criminalizing sexual assaults where the victim was less than 16 years of age and the offender is four or more years older. Noting that age classifications do not implicate suspect classes and therefore do not trigger strict scrutiny, the court held that the statute

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[9]739 So.2d 1230 (Fla. Dist. Ct. App.1999).

[10]*Id.*

[11]*Id.* at 1232.

[12]758 A.2d 1149 (Pa. 2000).

met the rational basis test by serving the legitimate state interest in protecting minors less than 16 years of age from older teenage and adult sexual aggressors.[13]

Defendant concedes that the Family Court, in discussing the legislative intent behind the 1998 changes to Delaware's statutory scheme for sexual offenses, stated in *dicta* that "the statutes afford protection to the younger age victim. The present policy also factors in characteristics of the defendant. . . such as where an older defendant is involved with a teenage victim."[14] Defendant does not dispute that this example is fits the scenario addressed in § 770 (a)(2).

In the case at bar, the statute in question does not create a classification based on gender but on age and marital state. The Court finds that § 770(a)(2) demonstrates a legislative intent to protect minors from the possible hazards of interaction with adults. Section 770(a)(2) provides protection against unmarried sexual intercourse between a person over the age of 30 with a victim under the age of 18. Section 123 protects a minor from entering into marriage without a court order based on a petition from an adult relative or next friend. As this Court stated in *State v. Brothers,* the "legislature is free to recognize degrees of harm and to legislate where the need for severe punishment is deemed to be greatest."[15] The Court holds that § 770(a)(2) is not in violation of the Equal

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[13] *Id.*

[14] *State v. Sapps*, 820 A.2d 477, 487 (Del. Fam. Ct. 2002).

[15] 384 A.2d at 405 (citing *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937)).

Protection Clause of the federal Constitution.

Conclusion. The Court's decision that 11 *Del. C.* § 770(a)(2) does not violate equal protection is not based on a strict scrutiny analysis of an inherently suspect classification, such as race or alienage, or of a fundamental right, such as privacy or age. Here the test is whether the provisions of the statute are rationally related to a legitimate government purpose, and if they are, the statute will not be set aside.[16] That State interest is to protect juveniles from the sexual advances of persons over the age of 30, as suggested by the Family Court in *Sapps,* and the Court finds that the statute is a valid means of attaining that objective.

For all these reasons, Defendant's motion to dismiss the indictment is **DENIED.**

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary
cc: David Hume, IV, Esquire
Michael R. Sensor, Esquire

[16] *Sisson v. State*, 903 A.2d 288, 314 (Del. 2006).